

Comments to the Federal Communication Commission
re: MB Docket No. 02-230
“Broadcast flag mandate”

A mandated broadcast flag will push on to taxpayers and consumers the increasing costs of enforcing increasingly archaic copyright paradigms rather than the studios who hold the copyrights.

Many large IP-holders have decided that only an elaborate, centrally-controlled and mandated system spanning both hardware – DVD players, personal computers, *etc.* – and software – DVDs, CDs, operating systems – is the only way to continue capturing the “lost revenue.” This is the current position most forcefully advocated by the likes of Jack Valenti, the head of the Motion Picture Association of America. Movie producers have long been able to capture revenue from consumers in a number of markets – theaters, home video, premium cable, and broadcast on networks and basic cable. As consumer power to replicate high-quality digital copies of films approaches that of the studios’, the MPAA et alia are understandably panicky.

Mandated receivers

The proposed broadcast flag mandate would have every piece of hardware conceivably able to play digital intellectual property be equipped to read and obey certain commands and written into the software. For example, a DVD may have a “flag” containing permission to watch on your PC, but not to be ripped on to your hard drive. The plan would extend beyond software such as DVDs, but to broadcasts as well. A “flag” in your VCR or DVD burner may be set so that the consumer can record a program and watch it once, for instance. Or maybe it would be set the consumer can’t fast forward through the commercials.

The chief benefit of such a set up is that the producer and consumer can agree on an explicit contract when the DVD is purchased. The consumer knows upfront what the rules of the game are and agrees to the terms set forth on the packaging. If the consumer feels the rights are too restrictive, he can simply not buy the product. Broad enforcement by the government of the hardware manufacture mandates and the IP-use contracts ensures content providers don’t “lose” money to piracy and receive enough of a return to continue producing content that consumers enjoy.

The problem with a broadcast flag mandate is that a one-size-fits-all mandate simply cannot and will not be able to respond to the diverse tastes on consumers. Consumers are becoming increasingly used to controlling for themselves how they consumer media. The VCR revolution got many consumers (those who can program their VCRs) used to “time-shifting” – watching a program at a time other than it airs. Consumers value this kind of control. Witness the quick death of the “DivX” format. DivX was a kind of pay-per-view DVD. While there may be a place for micropayments, consumers did not support a format that so limited the use of a physical asset. If Hollywood is successful in having Congress mandate a one-size-fits-all system, the risk is great that such a system

might be too rigid for the tastes of so many consumers that the system will just backfire, spawning a greater investment in “piracy” by both hackers and tech-savvy-enough consumers than would be the case if the content producers looked to market solutions in building a digital rights management system.

And finally, such a government mandate puts the cost of IP protection on the back of all taxpayers rather than the copyright holders and their consumers. This is the classic principal-agent problem – the people manufacturing the DRM systems will have no incentive to keep costs down and look at other innovative ways of protecting IP since the Justice Department and the FCC – and ultimately the taxpayer -- will be carrying the load.

Mandated transmission flags

Mandated transmission flags (Point 5 of the NOPR) would be particularly outrageous. Broadcasters who wish to communicate information to all consumers, not just those who have certain hardware or software on their television sets, would not be free to do so if such a flag was mandated for transmitters. This would be violative of transmitters’ First Amendment rights.

Mandated transmission flags would also drive up the cost of production, resulting in fewer programming choices for consumers.

Mandating specific technologies

Mandating specific technologies poses the same free-speech and consumer choice mal-effects as mandated transmission flags. Competition, including from open-source will be needed to keep costs down and ensure real choices for consumers.

If open-source receivers are available to users, developers of the dominant broadcast-flag regime will have to hustle to not only keep the user interface simple and secure but also to keep the digital-rights management (DRM) rules reasonable. As the rules get more restrictive, more and more people will migrate to the open-source frontier. And the more active that sector is, the greater the number of pirated files loosed into cyberspace.

Thus, by monitoring by how many people stick with authorized services versus how many migrate over to off-the-grid systems, with all the inconveniences such platforms entail, the content/hardware producer alliances manufacturing a DRM system will know that certain variables of their product – price, features, security, privacy, quality – need to be tinkered with.

Therefore, any successful DRM platform will certainly have to be able to play “unflagged” files, or at the least include among the array of “broadcast flags” which digitally dictate content-use rules, one coded as “use-or-copy-anywhere.” For the passive culture consumer is a thing of the past, if it ever existed at all. Consumers will insist they still be able to create and share content for personal use, and independent artists need to

be able to freely distribute their work to find an audience. Those artists who do so successfully often subsequently find themselves working for, and earning revenue for, the large entertainment companies.¹

A sophisticated platform would also allow for fair-use applications of the content. Allowing x number of clips of y number of seconds to be freely excerpted, for the purposes of review or the creation of new works, would not only be in line with rights afforded under current copyright law, but also give consumers that much less incentive to wander off the reservation.

Therefore, the existence of the open-source in a competitive DRM regime will force large IP holders to recognize and capitalize on the desire of many consumers to take a more active role in how they watch and use entertainments, rather than continuously work to calcify existing arrangements.

Broadcasters could try to set up a contractual regime set up whereby the viewing of television advertisements is understood to be part of the obligation of the consumer. But this would run contrary to first-sale doctrine. The first-sale doctrine makes a kind of intuitive sense – once I buy something (a book, a DVD, a television transmission) it is mine to do with as I please as long as I don't violate the rights (here, the copyright rights) of others. Even setting aside the fact that no such contractual obligation yet exists, attempts, by copyright holders to negate the first-sale doctrine are ultimately a self-defeating overreach.

It should be noted that other groups outside the BPDG consortium are pushing for a Congressional mandate of their own. The base contention is that Digital Millennium Copyright Act went to far in that it outlawed not certain uses of copyrighted material, but simply the act of decrypting certain encryption of copyrighted materials. Their answer is to pass a competing set of mandates, guaranteeing the rights of consumers to time-shift their media consumption, to “space-shift” by making copies for use on other media, to make backup copies, and so on.

There is a certain logic to this in the face of the DMCA and potential Washington mandates that would further erode such common-law consumer rights. All of these are important to a number of media consumers.

But this too, would seem to go too far. Given that such uses are important to a large number of consumers, content producers have a great incentive to meet those consumer tastes. Piling one mandate on top of another isn't a recipe for anything but greater costs and prices. And although such rights generally arose in the courts as common law from copyright disputes, the occasional superceding of such rights by contract (in tandem with technology) is not wholly unreasonable. Such consumer-producer agreements may indeed at times be a reasonable compromise to enable to producer to recoup his investment revenue.

¹ For example, Trey Parker and Matt Stone's widely distributed video Christmas Card served as the pilot for the television series and pop-culture phenomenon South Park. Other examples abound.

PRIVACY

Any mandated technology requiring two-way communication, such that transmitter (and, therefore, potential hackers) knows what, when and how consumer is viewing television, is a violation of consumer privacy rights. Consumers should not be forced into any such arrangements by federal mandate and should only enter into such arrangements by contract, explicit or implicit, with transmitters.

JURISDICTION

Finally, FCC has no constitutional power to mandate such a flag since most consumers receive broadcast signals beamed from elsewhere in their own state. Such intrastate commerce does not fall under federal purview, as it is only interstate commerce regulation that is listed among the enumerated powers of the US Congress.

BOTTOM-LINE EFFECT ON CONSUMERS AND CONCLUSION

A federally mandated and enforced broadcast flag regime will only result in higher costs to consumers for both entertainment hardware and the content itself. All taxpayers, not just IP consumers, would bear the burden of enforcement costs. The leading proposals would also give consumers less choice in how to use the content. To encourage consumer choice and lower prices, FCC should promote an aggressive deregulation agenda across the board.

This should include backing off FCC's increasing propensity to assert a "right" to review mergers and other cross-firm business models. FCC should also press colleagues at the Federal Trade Commission and Department of Justice to back off antitrust action in this area so firms – content producers, hardware producers, and content and service providers -- are free to work on cross-industry solutions to meet consumer needs. This is the opposite side of the coin, but it is just as important.

Consumers and firms can find the best solutions to new and fluid situations in the marketplace. There is no need for FCC or any other federal agency to either hamper market solutions -- nor to mandate "solutions" such as the broadcast flag.

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